Appendix.

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372; 49 Stat. 449; U.S. Code, Supp. IV, Title 29, sec. 151 *et seq.*) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"Sec. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * * * *

"Sec. 10.

"(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * * * * * *

"(e) The Board shall have the power to petition any circuit court of appeals of the United States * * * for the enforcement of such order * * *. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

"(f) Any person aggrieved by a final order of the Board * * * may obtain a review of such order in any circuit court of appeals of the United States * * * and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 496

ELKLAND LEATHER COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The Government does not oppose the granting of the petition for certiorari in this case, but suggests that the writ, if it be granted, should be limited to the second question presented in the petition.

(1) The principal question presented is whether Section 8 (1) of the National Labor Relations Act may, consistently with the First Amendment to the Constitution, be construed to prohibit as an unfair labor practice, in the circumstances of this case, the insertion by the petitioner in the pay envelopes of its employees of the statement quoted in the peti-

tion at page 4. The Government believes that, properly construed, this question depends upon an issue of fact—whether the communication in the circumstances does in fact constitute an interference with the rights conferred upon employees by Section 7—and that in this case the Board properly found as a fact that petitioner's statement, considered as an integral part of the pattern of its coercive tactics, did constitute such an interference. The Government further believes that the right of free speech guaranteed by the First Amendment does not comprehend the right to engage in unfair labor practices, whether through coercive statements or otherwise.

In this view, once the question of unfair labor practice is decided no question of constitutionality arises. The court below was apparently in agreement with this position for, having decided that the insertion of the statement in the pay envelopes was intended to discourage membership in the union (R. 3763), the court found it unnecessary to discuss any issue under the First Amendment.

However, the result reached by the court below may be said to be inconsistent with the reasoning of the Circuit Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *Ford Motor Co.*, decided October 8, 1940, 7 Labor Relations Reporter 163. In that case, the Board found that pamphlets disparaging and criticizing labor organizations had been distributed by the employer to its

employees in such a manner as to constitute an interference with the employees' rights of self-organization, particularly when viewed against the background of the employer's other unfair labor practices. The Circuit Court of Appeals, however, refused to enforce the provision of the Board's order directing the employer to refrain from this activity. The court expressed doubt whether a "denial of free expression by an employer on labor is ever justified by a judgment that it is coercive" and also whether the pamphlets distributed by the employer were in fact coercive. It is not wholly clear from the opinion upon which ground the decision is based, or whether it rests on both.

Because of the breadth of the *Ford* decision, it seems likely that, had the present case arisen in the Sixth Circuit, it would have been decided adversely to the Board. Consequently, although the court below did not discuss any issue under the First Amendment, we believe that the decision which it rendered may in a broad sense be said to be in conflict with the decision in the *Ford* case. And in this view resolution of the conflict by this Court is of great importance in the administration of the National Labor Relations Act since in many cases the unfair labor practices of employers take the form of coercive communications to their employees.

(2) Petitioner also seeks to have the Court review the question whether the Board may require that an employer found to have engaged

in unfair labor practices post notices that he "will cease and desist" from those unfair practices. On this question there have been, as pointed out in the petition (pp. 10–11), conflicting decisions among the Circuit Courts of Appeals. Since the decision of the Board in the present case, however, the Board has changed its practice and now provides in all cases that the employer's notices shall state that he "will not engage in the conduct from which" he is ordered to cease and desist, rather than that he "will cease and desist", as formerly required. Although the Board believes that its order in this case was proper (see *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 462; *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U. S. 318, 322, note 343–344), the Board will consent to a modification of the decree below to conform it to the Board's present practice, and consequently does not believe that the granting of the writ for this purpose is necessary.

(3) The third question presented in the petition, which constitutes a challenge to the form in which the findings of the Board were stated, presents no conflict and no question worthy of review. A cursory examination of the findings (R. 3673–3718) indicates the baselessness of petitioner's contention in this respect; the findings are full and definite and constitute complete compliance with the statutory requirement of Section 10 (c) that the Board shall make findings of fact.

Petitioner does not dispute that all findings of fact necessary to sustain the order were made, and the respects in which the Board found the petitioner violated the Act are clear from the decision. The cases of *National Labor Relations Board* v. *Thompson Products, Inc.*, 97 F. (2d) 13 (C. C. A. 6th), and *Western Union Tel. Co.* v. *National Labor Relations Board* (C. C. A. 2d), decided August 9, 1940, relied upon by petitioner (Pet. 14–17), are not in conflict. Although in those cases criticism was expressed of the form of the Board's findings, prejudice was not found in either case and neither decision turned in any way upon the form of the findings.

CONCLUSION

For the foregoing reasons, we do not oppose the granting of the petition for a writ of certiorari but suggest that the writ, if it be granted, should be limited to the second question presented in the petition.

Respectfully submitted.

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NOVEMBER 1940.

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